

**IN THE COURT OF APPEALS OF OHIO  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

BRANDEN MILLER,

Defendant-Appellant.

**CASE NO. 2022-P-0080**

Criminal Appeal from the  
Court of Common Pleas

Trial Court No. 2021 CR 00816

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**OPINION**

Decided: July 31, 2023  
Judgment: Reversed and remanded

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*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Larry W. Zukerman*, *S. Michael Lear*, *Brian A. Murray*, *Adam M. Brown*, and *Maxwell Y. Peltz*, Zukerman, Lear & Murray, Co., LPA, 3912 Prospect Avenue East, Cleveland, OH 44115 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Defendant-appellant, Branden Miller (“Mr. Miller”), appeals the judgment of the Portage County Court of Common Pleas denying, without a hearing, his application to seal the record of the dismissed indictment in the underlying case.

{¶2} Mr. Miller presents two assignments of error, contending (1) the trial court erred in summarily denying his application to seal without scheduling or holding a hearing; and (2) the trial court erred in denying his application on the purported basis that he is “currently on felony probation” for “corruption of a minor,” a first-degree misdemeanor.

{¶3} After a careful review of the record and pertinent law, we find the trial court erred by denying Mr. Miller’s application without scheduling and holding a hearing. The existing record demonstrates there are factual issues regarding Mr. Miller’s eligibility to seal the records in the underlying case. Thus, we reverse the judgment of the Portage County Court of Common Pleas and remand with instructions to schedule and hold a hearing on Mr. Miller’s application. Based on this disposition, Mr. Miller’s second assignment of error is dismissed as moot.

### **Substantive and Procedural History**

{¶4} In August 2021, the Portage County Grand Jury indicted Mr. Miller in the underlying case on three felony counts.

{¶5} On September 30, 2022, the trial court filed a nunc pro tunc journal entry containing the case numbers of the underlying case and case no. 2022 CR 01166. The journal entry states the matter came before the court on September 26, 2022, for a plea and sentencing hearing; Mr. Miller entered a written plea of guilty pursuant to Crim.R. 11(F) to “count one of the bill of information” charging him with unlawful sexual conduct with a minor, a first-degree misdemeanor, in violation of R.C. 2907.04; Mr. Miller knowingly and voluntarily entered into the written plea of guilty; and the court accepts same and finds him guilty.

{¶6} The journal entry further states Mr. Miller is a Tier I sex offender; he was notified of his sex offender registry requirements; he is sentenced to 180 days in jail, a fine, and court costs; his jail sentence is suspended on certain specified conditions, including two years of supervised probation; and “Case Number 2021 CR 816 [i.e., the underlying case] is hereby dismissed.”

{¶7} On October 17, 2022, Mr. Miller filed an application to seal the records in the underlying case pursuant to R.C. 2953.52(A)(1). Mr. Miller’s application contains a certificate of service indicating he served a copy on the state. There is no indication on the docket that the trial court scheduled or held a hearing on the application or that the state objected to Mr. Miller’s application. On November 8, 2022, the trial court filed a journal entry stating:

{¶8} “On, October 17, 2022, Branden Miller filed for an expungement on the above case number [2021 CR 00816]. However, Mr. Miller, is currently on felony probation for, Corruption of a Minor, a Misdemeanor of the First degree, out of the Portage County Common Pleas Court, case number 2022 CR 1166, this expungement is hereby denied.” [sic throughout.]

{¶9} Mr. Miller appealed and raises the following two assignments of error:

{¶10} “[1.] The Trial Court Erred When it Denied Defendant-Appellant’s Application to Seal, Filed Pursuant to R.C. § 2953.52 Without a Hearing.

{¶11} “[2.] The Trial Court Erred When It Denied Defendant-Appellant’s Application to Seal the Dismissed Case Because it Found that the Defendant-Appellant ‘Is Currently on Felony Probation for Corruption of a Minor a Misdemeanor of the First Degree.’”

{¶12} We review Mr. Miller’s assigned errors together for ease of discussion.

### **Standard of Review**

{¶13} An appellate court reviews a lower court’s decision to deny a motion to seal for abuse of discretion. *State v. Torres*, 11th Dist. Trumbull No. 2020-T-0035, 2020-Ohio-5390, ¶ 13. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. Clark No. 09-CA-54,

2010-Ohio-1900, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.2004). When an appellate court must interpret and apply statutory provisions, its standard of review is de novo. *Torres* at ¶ 13.

### Legal Requirements

{¶14} Mr. Miller's application is governed by former R.C. 2953.52,<sup>1</sup> which provides, in relevant part, "Any person, \* \* \* who is the defendant named in a dismissed \* \* \* indictment \* \* \* may apply to the court for an order to seal the person's official records in the case. *Except as provided in [R.C. 2953.61],* the application may be filed any time after \* \* \* the dismissal of the \* \* \* indictment \* \* \* is entered upon the minutes of the court or the journal, whichever entry occurs first." (Emphasis added.) R.C. 2953.52(A)(1).

{¶15} R.C. 2953.61(A), in turn, provides, "a person charged with two or more offenses *as a result of or in connection with the same act* may not apply to the court pursuant to [R.C. 2953.32 or 2953.52] for the sealing of the person's record in relation to any of the charges when at least one of the charges has a final disposition that is different from the final disposition of the other charges until such time as the person would be able to apply to the court and have all of the records pertaining to all of those charges sealed pursuant to [R.C. 2953.32 or 2953.52]." (Emphasis added.)

{¶16} "Upon the filing of an application pursuant to [R.C. 2953.52(A)], the court *shall set a date for a hearing* and shall notify the prosecutor in the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify

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1. The Supreme Court of Ohio has held that the law in effect at the time of the filing of an application to seal a record is controlling. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, paragraph two of the syllabus.

in the objection the reasons the prosecutor believes justify a denial of the application.” (Emphasis added.) R.C. 2953.52(B)(1).

{¶17} The trial court is required to make several findings before sealing records under R.C. 2953.52(A)(1). First, the court must determine whether the indictment was dismissed and, if so, whether it was dismissed with or without prejudice. R.C. 2953.52(B)(2)(a)(i) and (ii). If it was dismissed without prejudice, the court must determine whether the relevant statute of limitations has expired. R.C. 2953.52(B)(2)(a)(ii). Second, the court must determine whether criminal proceedings are pending against the applicant. R.C. 2953.52(B)(2)(b). Third, if the prosecutor has filed an objection, the court must consider the reasons against granting the application specified by the prosecutor. R.C. 2953.52(B)(2)(c). Finally, the court must weigh “the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records.” R.C. 2953.52(B)(2)(d).

{¶18} If the court determines the indictment was dismissed with prejudice, or the indictment was dismissed without prejudice and the relevant statute of limitations has expired, “the court shall issue an order to the superintendent of the bureau of criminal identification and investigation directing that the superintendent seal or cause to be sealed the official records in the case consisting of DNA specimens that are in the possession of the bureau and all DNA records and DNA profiles.” R.C. 2953.52(B)(3). If the court additionally determines that no criminal proceedings are pending against the applicant and the interests of the applicant in having the records pertaining to the case sealed are not outweighed by any legitimate governmental needs to maintain such records, “the court shall issue an order directing that all official records pertaining to the

case be sealed and that, except as provided in [R.C. 2953.53], the proceedings in the case be deemed not to have occurred.” R.C. 2953.52(B)(4).

### **Analysis**

{¶19} This court has held that generally, a hearing on an application to seal records is mandatory. See *State v. Potts*, 11th Dist. Trumbull Nos. 2019-T-0038 and 2019-T-0039, 2020-Ohio-989, ¶ 14. This holding is predicated upon the fact that under normal circumstances, a trial court would be required to hear evidence before rendering its decision. *Id.* The hearing “provides the court with the opportunity to review matters of record and to make largely subjective determinations \* \* \*.” *State v. Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996). “The court is permitted to gather information relevant to these inquiries from the applicant, the prosecutor, and through independent court investigation conducted with the aid of probation officials.” *Id.* “The essential purpose” of such a hearing “is to provide a reviewing court with all relevant information bearing on an applicant’s eligibility \* \* \*.” *Id.*

{¶20} This court has also held that a hearing is *not* required when it would simply serve no purpose. *Potts* at ¶ 15. More precisely, there are circumstances where the trial court does not need to resolve any factual issues in determining an applicant’s eligibility for the sealing of records. *Id.* For example, in *Aurora v. Bulanda*, 11th Dist. Portage No. 95-P-0130, 1996 WL 648995 (June 14, 1996), this court found that a hearing was not required where the applicant was convicted of an offense that was not eligible to be sealed under R.C. 2953.36. See *id.* at \*4. We explained the applicant “could not have presented any evidence which could have changed the outcome \* \* \* because the trial court simply had no discretion to grant her motion.” *Id.* Similarly, in *Potts*, we found a hearing would

have served no purpose where the trial court made the threshold determination that the appellant was not eligible for sealing his records as a matter of law. *Id.* at ¶ 16.

{¶21} The state contends the trial court was not required to schedule and hold a hearing on Mr. Miller’s application because he could not meet the timing requirement in R.C. 2953.61(A). The Supreme Court of Ohio has held that “[a] trial court is precluded, pursuant to R.C. 2953.61, from sealing the record of a dismissed charge if the dismissed charge arises ‘as the result of or in connection with the same act’ that supports a conviction when the records of the conviction are not sealable \* \* \*, regardless of whether the charges are filed under separate case numbers.” *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, syllabus. According to the state, Mr. Miller was charged with three offenses in the underlying case and one offense in case no. 2022 CR 01166; the charges involved the same behavior, dates of occurrence, and alleged victim; and the charges proceeded to different final dispositions, with the underlying case being dismissed and with Mr. Miller being convicted and sentenced in case no. 2022 CR 01166. Thus, the state argues, Mr. Miller’s application is premature.

{¶22} The trial court’s September 2022 journal entry indicates Mr. Miller was charged in two separate cases and that those charges resulted in different dispositions. However, there is no indication the trial court denied Mr. Miller’s application based on R.C. 2953.61. Instead, the trial court’s stated basis was that Mr. Miller is “currently on felony probation” for “corruption of a minor” in case no. 2022 CR 01166. These statements are inconsistent with the September 2022 entry.

{¶23} In addition, the existing record does not indicate whether Mr. Miller’s charges were “a result of or in connection with the same act” under R.C. 2953.61(A). The state relies on factual allegations purportedly set forth in the bill of information filed in case

no. 2022 CR 01166; however, the record of that case is not before us. Further, the indictment in the underlying case suggests there was more than one act. The record contains no transcript of the plea/sentencing hearing; therefore, the factual basis for Mr. Miller's guilty plea in case no. 2022 CR 01166 is unclear. "[W]here the record does not contain facts regarding the events which led to the multiple charges at issue under R.C. 2953.61, the trial court will have to hold a hearing to ascertain those facts." *In re K.J.*, 10th Dist. Franklin No. 13AP-1050, 2014-Ohio-3472, ¶ 17.

{¶24} In sum, the existing record demonstrates factual issues regarding Mr. Miller's eligibility to seal the records in the underlying case. Accordingly, the trial court erred by denying Mr. Miller's application without scheduling and holding a hearing.

{¶25} Mr. Miller's first assignment of error has merit. We reverse the trial court's judgment and remand with instructions to schedule and hold a hearing on Mr. Miller's application. Since this disposition renders Mr. Miller's second assignment of error moot, it is dismissed.

{¶26} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

MATT LYNCH, J.,

EUGENE A. LUCCI, J.,

concur.